SUPREME COURT, U. S.

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No. 72-1162

In the Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION, *Petitioner,*

v.

NEW ENGLAND POWER COMPANY, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TENNESSEE GAS PIPELINE COMPANY, a Division of TENNECO INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)[1] is reported at 467 F. 2d 425. Order No. 427 of the Federal Power Commission (Pet. App. 18a-50a) and its order denying rehearing (Pet. App. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

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[1] "Pet. App." references are to the appendices to the Petition in No. 72-1162.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED [2]

1. Whether Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) authorizes the Federal Power Commission to impose upon natural gas pipeline companies subject to its jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, annual general charges designed to recoup the costs incurred in carrying out its regulatory activities against pipeline companies under the rate and accounting provisions of the Natural Gas Act.

2. Whether Title V permits the Commission to impose annual assessments upon natural gas pipeline companies to recover the costs related to its processing of certificate applications by independent producers seeking authorization to sell natural gas.[3]

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[2] Respondent Independent Natural Gas Association of America (INGAA) is a non-profit trade association representing virtually all of the major natural gas pipeline companies in the United States, all of which are subject to the jurisdiction of the Commission under the Natural Gas Act. As it did in the court of appeals, INGAA will address itself to the Commission's Order No. 427 as it affects natural gas pipeline companies.

[3] In the court of appeals, INGAA challenged not only the power of the Commission to impose the annual charges and assessments referred to in Questions 1. and 2. above, but also the methods by which the Commission exercised the disputed power. Concluding that the Commission lacked such power, the court of appeals did not reach the questions raised concerning its exercise (Pet. App. 2a). The Petition is limited to the power question decided below.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a, is set forth in the Petition at pp. 2-3.

STATEMENT

This case arises from a proceeding instituted by the Federal Power Commission's Notice of Proposed Rulemaking issued November 25, 1970 (App. A, *infra*, pp. 1a-16a). Therein, the Commission proposed for the first time to impose two types of annual charges upon natural gas pipeline companies for the purpose of recouping costs incurred by it in the administration of the Natural Gas Act.[4]

The Commission proposed an annual general charge to be assessed against Class A and Class B pipeline companies only[5] for the purpose of recouping "the costs of administration of the natural gas pipeline programs" (App. A, *infra*, p. 15a). The Commission first noted that the costs incurred in handling pipeline certificate applications would be made self-sustaining by the proposed increase in certificate ap-

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[4] By its Order No. 317 issued in 1966, the Commission had previously assessed filing fees relating to applications by pipelines seeking specific authorizations under the Natural Gas Act, 35 FPC 30, 392 (1966). By its Notice of Proposed Rulemaking here, the Commission also proposed to increase the existing fees pertaining to pipeline certificate applications (App. A, *infra*, pp. 5a, 14a-15a). Such fees are not in issue here.

[5] Class C and D pipeline companies, having less than $1,000,000 of annual gas operating revenues, were exempted from the annual general charge without explanation.

plication fees. Thereupon, the Commission made clear the purpose of the annual general charge as follows:

> "The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings . . ." (App. A, *infra*, p. 5a).

The Commission proposed that the total annual general charge designed to recoup its costs of pipeline rate regulation would be allocated to each Class A and Class B pipeline company in the proportion that each company's total gas deliveries bear to the total gas deliveries of all Class A and Class B companies (App. A, *infra*, p. 15a).

In addition, the Commission proposed a second annual charge, herein referred to as the "annual reserves added assessment," to be imposed upon those pipeline companies required to file an Annual Report—Total Gas Supply on FPC Form No. 15. This assessment upon each pipeline company was to be one-tenth of a mill for each Mcf[6] of new reserves certificated during the year, as shown on the particular pipeline company's FPC Form No. 15 (App. A, *infra*, p. 16a). The purpose of the proposed assessment is to recoup the Commission's cost of processing the certificate applications of independent producers seeking authorization to sell natural gas. The Commission noted that —for reasons of "administrative convenience"—it was imposing the annual reserves added assessment not upon the producers but on the pipeline companies (App. A, *infra*, p. 6a).

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[6] An Mcf is the equivalent of 1000 cubic feet of gas.

In its Notice of Proposed Rulemaking, the Commission relied upon Title V of the Independent Offices Appropriation Act of 1952 (Pet., pp. 2-3) and Bureau of the Budget Circular No. A-25 dated September 23, 1959 (Pet. App. 61a-62a) as the bases for the increased application fees and the two annual charges proposed to be assessed against the pipeline companies, as discussed above. On March 18, 1971, the Commission issued its Order No. 427 promulgating its proposed rule substantially as proposed, following the submission of written comments by interested persons (Pet. App. 18a-50a).[7]

The objections of INGAA and others to the proposed imposition of the two annual charges upon the pipeline companies were denied. In dismissing the objections to the annual general charge, the Commission conceded that its regulation of pipeline rates and accounting methods "has provided continuing benefit to consumers." Nevertheless, it purported to justify the annual general charge by its conclusory assertion that such regulation has benefitted the pipeline industry "by creating the economic climate for greater usage of the services" of the pipeline companies (Pet. App. 30a-31a).

On rehearing of Opinion No. 427, the Commission's attention was directed to the rulemaking proceeding resulting in its Order No. 317 issued in 1966 in which it promulgated its first schedule of fees for filing applications for specific authorizations under the Natural Gas Act (35 FPC 30). In its Notice of Proposed Rulemak-

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[7] Although Order No. 427 made certain modifications to the proposed rule, these are not material for present purposes.

ing there (App. B, *infra*, pp. 17a-23a), the Commission unequivocally recognized its lack of authority under Title V to impose an annual general charge, comparable to the one in issue now, and stated:

> ". . . The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate *since these activities are primarily for the benefit of the general public rather than the regulated companies*" (App. B, *infra*, p. 18a, emphasis added).

Nevertheless, in its order issued May 14, 1971 denying rehearing of Opinion No. 427 (Pet. App. 51a-60a), the Commission disregarded the above pronouncement, characterizing it as mere dictum (Pet. App. 56a) despite the fact that Title V and the 1959 Budget Circular A-25 had remained unchanged during the interim. Thereupon, the Commission reiterated its generalized view that the annual general charge meets the standards of Title V since it is "predicated on the benefits accorded . . . natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress" (Pet. App. 57a).[8]

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[8] In the same order, the Commission undertook for the first time to justify the imposition of the annual reserves added assessment upon pipeline companies on grounds other than administrative convenience (Pet. App. 57a). This belated justification also constitutes an about-face by the Commission from its first rulemaking proceeding relating to specific fee assessments under the Natural Gas Act (App. B, *infra*, p. 18a).

On petitions for review, the court of appeals set aside the annual general charge and the annual reserves added assessment imposed upon pipeline companies by Order No. 427 (Pet. App. 1a-13a).[9] Determining that Title V authorized the Commission "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public", the court concluded that these annual charges could not be imposed since their purpose is to recoup costs incurred in "the administration of programs benefitting the general public" (Pet. App. 7a, 10a). Regarding the annual general charge, the court "wholeheartedly" concurred with the position first taken by the Commission in 1966 that charges or fees designed to recover the costs of rate and accounting regulation of natural gas pipeline companies were inappropriate since these activities are primarily for the benefit of the general public rather than the regulated companies (Pet. App. 10a).

ARGUMENT

The court of appeals correctly held that the annual charges imposed upon natural gas pipeline companies are not sanctioned by Title V of the Independent Offices Appropriation Act of 1952. Having analyzed Title V in light of its legislative history and the interpretation of Title V by the Bureau of the Budget's Circular No. A-25, the court considered the nature and purpose of the annual charges within the confines of

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[9] The court of appeals also set aside the annual charges therein assessed against electric utilities to recoup costs of administering Parts II and III of the Federal Power Act (16 U.S.C. 824 *et seq.*). This aspect of the court's decision will be addressed by New England Power Company in its brief in opposition.

the Natural Gas Act. Since the annual charges are designed to recoup the costs incurred by the Commission in regulating the rates of the pipeline companies, the court concluded, consonant with the purpose of the Natural Gas Act, that such costs primarily benefit the public and cannot be imposed upon the pipeline companies under Title V. Thus, the question decided by the court below is limited by the particular facts and statutes involved and is not one of general applicability or importance. Further, the decision below is clearly distinguishable from and is not in conflict with the approach of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313, petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948.

1. The primary purpose of the annual general charge is to recover the Commission's cost of exercising its function of reviewing the rates of pipeline companies under Sections 4(e) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(e), 717d(a).[10] The Commission claims Title V as its authority to impose such charge.[11] Therein, Congress granted federal agencies the power to charge any person for service rendered and benefit conferred only for the purpose of rendering the particular service or benefit as self-sustaining as possible. Title V reflected the concern of the House Committee

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[10] App. A, *infra,* p. 5a.

[11] In the court of appeals, the Commission contended for the first and last time that Section 16 of the Natural Gas Act, 15 U.S.C. 717o, provided ample authority for its imposition. The court of appeals rejected this argument (Pet. App. 11a-13a). The Commission has now abandoned this contention in its Petition.

on Appropriations that "special beneficiaries" of services provided by federal agencies were not being adequately assessed for such services.[12] The guidelines for application of Title V are contained in Bureau of the Budget Circular No. A-25, dated September 23, 1959 (Pet. App. 61a-62a). It provides, as general policy, that a reasonable charge should be made "to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (*id.* at 61a). It further states that if such "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost . . . of rendering that service" (*id.* at 61a). Finally, it states that no charge should be made for services "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public" (*id.* at 62a).

In relying upon Title V and Budget Circular A-25 as support for imposing the annual general charge upon pipeline companies to recoup the costs of regulating their rates, the Commission ignored the nature and purpose of its rate review functions under the Natural Gas Act. The Act requires pipeline companies to file their rates with the Commission and, thereafter, no change in any rate shall be made except after thirty days'

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[12] Title V was a rider to an appropriation measure (H.R. 3880, 82d Cong., 1st Sess.). In its report on Title V, the House Appropriations Committee stated in pertinent part:

> "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries." H. Rep. No. 384, 82d Cong., 1st Sess. (1951), p. 2.

notice, 15 U.S.C. 717c(c) and (d). If the notice period expires without Commission action, the rate change becomes effective. However, upon the filing of a notice of rate change, the Commission may, in its discretion, initiate a hearing concerning the lawfulness of the noticed rate and suspend its effectiveness for no more than five months. At the end of the suspension period, the noticed rate shall go into effect upon motion of the pipeline company subject to possible refund, 15 U.S.C. 717c(e). This Court has observed that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such". *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956). In the foregoing statutory context, this Court in *Mobile, supra,* has observed that:

> ". . . the Natural Gas Act permits the relations between the parties to be established initially by contract, *the protection of the public interest* being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public" (350 U.S. at 339, emphasis added).
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> . . . . .
>
> ". . . In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act" (350 U.S. at 343, emphasis in the original).

In light of the foregoing, it is unreasonable to suggest that a pipeline company, whose rates the Commission decides to review, is a "special beneficiary" of a

service rendered by the Commission at the pipeline company's request. While a pipeline company has the duty to file its rates and to give notice of any change in such rates, the pipeline company does not thereby place its rates in issue. Only if the Commission elects to review such rates under Section 4 or Section 5 of the Natural Gas Act for "the protection of the public interest" are the Commission's costs of rate review ever incurred. Yet, the only basis for the Commission's imposition of such costs upon pipeline companies via the annual general charge is Title V which, read in conjunction with Budget Circular No. A-25, is clearly limited to recouping the cost of a service which "provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large" (Pet. App. 61a).

As the court of appeals noted (Pet. App. 9a, n. 10), this Court has made clear that the primary beneficiaries of the Natural Gas Act are not the pipelines but rather the ultimate consumers of natural gas. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610-12 (1944); *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 388-89 (1959). As stated in *Atlantic Refining*, "[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" (360 U. S. at 388).

Similarly, justification for the Commission's annual reserves added assessment cannot be found in Title V and Budget Circular A-25. As noted above, its purpose is to recoup from pipeline companies the Commission's cost of processing certificate applications filed by independent producers seeking authority to sell gas for re-

sale in interstate commerce.[13] Budget Circular A-25 states that a reasonable charge should be made "to each identifiable recipient for a measurable unit . . . of Government service . . . from which he derives a special benefit" (Pet. App. 61a). Inasmuch as pipeline companies have been assessed filing and processing fees relating to their own certificate applications since 1966 (35 FPC 30), it would seem logical and consistent if the Commission were to assess independent producers for the cost of processing their own certificate applications.[14]

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[13] In the rulemaking proceeding culminating in the Commission's first application fee schedule (35 FPC 30), the Commission refused to charge applicant producers for the costs incurred in processing their certificate applications. Acting pursuant to Title V and Budget Circular No. A-25, the Commission explained its refusal as follows:

> "The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, *both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons*" (App. B, *infra*, p. 18a, emphasis added).

While noting unexplained "administrative difficulties", the Commission essentially viewed the producer certification process as involving its rate review function which it then considered to be "primarily for the benefit of the general public" (App. B, *infra*, p. 18a).

[14] In its Notice of Proposed Rulemaking (App. A, *infra*, p. 6a). the Commission cited "administrative convenience" as the reason for assessing pipeline companies rather than independent producers for the cost of processing the producers' certificate applications. Neither Title V nor Budget Circular A-25 suggest "administrative convenience" as a basis for the assessment of fees or charges.

Forsaking "administrative convenience" as the reason for assessing pipelines for the cost of processing producer certificate applications, the Commission finally referred to certain allegedly "clear benefits" accruing to pipelines from the producer certification process in its order denying rehearing of rulemaking Order 427 (Pet. App. 57a). The first "benefit" mentioned is control of the producers' initial prices through certificate conditions. As this Court made clear in *Atlantic Refining, supra,* a certificate condition affecting the initial price of an independent producer may be imposed when such price is "not in keeping with the public interest" as represented by the ultimate consumers of natural gas (360 U.S. 388-391). The other "clear benefits" include the expedition of gas deliveries to pipelines through issuance of temporary certificates to producers. As with each of the "benefits" listed, expedition of gas deliveries primarily benefits the ultimate consumers. This is particularly true at the present time when the demands for natural gas have outrun available supplies. *Area Rate Proceeding, et al. (Southern Louisiana Area)*, 46 FPC 86, 110-11, 113 (1971).

The Commission erroneously contends that the court below set aside the annual charges assessed against pipeline companies in the belief that "annual charges for regulating activities which benefit an entire industry may not be imposed" under Title V (Pet., p. 11). To the contrary, the court of appeals held that since these annual charges are designed to recoup the costs of regulatory activities performed "primarily for the benefit of the public", it is fundamentally wrong to impose such costs upon the pipeline companies (Pet. App. 9a-10a).

2. There is no conflict between the "approach" of the court below and the "approach" of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.* The Federal Power Commission does concede that the nature of its regulation of the electric power and natural gas industries is "sufficiently different" from the FCC's regulation of broadcast licensees and cable television (CATV) operators involved in *Clay Broadcasting* as to make the decisions of the court below and the Fifth Circuit factually distinguishable (Pet., p. 16). However, the Commission erroneously contends that the "approaches" of the two courts are opposed because the Fifth Circuit recognized industry-wide benefits as a basis for annual fees under Title V whereas the court below set aside annual charges since "only industry-wide benefits are conferred" (Pet., p. 16). In so saying, the Commission simply ignores the holding of the court below that the Commission's annual charges are not authorized by Title V since they are imposed upon regulated companies to recoup the Commission's costs of regulatory activities performed "primarily for the benefit of the public" (Pet. App. 9a).

On the other hand, *Clay Broadcasting* involves the FCC's imposition of annual license fees upon broadcast licensees and CATV operators. In affirming these fees as authorized by Title V, the Fifth Circuit took careful note of the special benefits conferred upon broadcasters and CATV operators by the FCC's regulatory activities (Pet. App. 70a, 78a-79a).[15] Thus,

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[15] When Title V was being considered by Congress, one of its sponsors stressed the special benefits which accrue to broadcasters licensed by the Federal Communications Commission, 97 Cong. Rec. 4809 (1951).

it is readily apparent that the decision below and the *Clay Broadcasting* decision in no way conflict. Concededly distinguishable on their facts, each decision recognizes that Title V, as interpreted by Budget Circular A-25, authorizes a federal agency to impose a charge upon identifiable recipients for special benefits conferred. Each court, however, was obliged to determine within the confines of markedly different regulatory statutes whether certain regulatory activities conferred special benefits upon the particular companies against which the charges in question had been imposed. The fact that the FPC's annual charges were set aside by the court below and the FCC's annual license fees upheld by the Fifth Circuit only serves to highlight the differences between the nature and purpose of the regulatory activities performed under the particular regulatory statute involved. Consequently, the difference in result reached by the two courts cannot properly be attributed to a conflict in their approach under Title V.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1973

APPENDIX A

APPENDIX A

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 32, 33, 34, 35, 36, 45, and 159]

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

Notice of Proposed Rulemaking

(November 25, 1970)

Notice is hereby given, pursuant to Section 553 of Title 5 of the United States Code that the Commission is proposing to amend its general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies under the Natural Gas Act and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas producers and pipelines.

Any interested person may submit to the Federal Power Commission, Washington, D.C., 20426, not later than December 18, 1970, data, views, comments, and suggestions, in writing, concerning all or part of the amendments proposed herein. An original and 14 conformed copies should be filed with the Secretary of the Commission. Submittals to the Commission should indicate the name, title, and mailing address of the person to whom communications concerning the proposal should be addressed, and whether

the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments. The Commission will consider all such written submittals before acting on the matters herein proposed.

Annual charges have long been assessed against licensees of hydroelectric projects pursuant to Congressional direction contained in Part I of the Federal Power Act to require payment *inter alia* by them "in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part;" and "for recompensing it for the use, occupancy, and enjoyment of its lands or other property. . .".[1]

Additionally, Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person

[1] In addition, licensees and holders of permits affected by a determination by the Commission of headwater benefits are required to pay to the United States the cost of making such determination. Provisions for such payments appearing in Section 10(e) and (f) were contained in the original Federal Water Power Act, 41 Stat. 1063, approved June 10, 1920. Implementing regulations appear in Part II of the Commission's Regulations Under the Federal Power Act, 18 CFR 11.20 *et seq.*

(including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890,

March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

In compliance with the spirit of the 1952 Appropriation Act, Executive directives[2] and subsequent Committee recommendations, we have thoroughly reviewed the existing fee structure and the areas of our administrative operations which have not heretofore been subject to any charges. The fee schedules we propose to adopt have been prepared in the light thereof to meet the statutory objective of making the Commission "self-sustaining to the full extent possible", to recoup by way of payment into the Treasury of the United States the sums reasonably allocable to the estimated costs in FY 1971 of rendering the types of services performed by the Commission as reflected by costs experienced in FY 1970, and to allocate fees and charges

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[2] Circular No. A-25, issued September 23, 1959 by the Bureau of the Budget (now Office of Management and Budget), as subsequently amended, sets forth for agency action the scope of user charges activities, guidelines for carrying out the policies prescribed therein and required submission of periodic status reports.

as fairly and as equitably as practicable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ".

We propose no changes in the fee schedule relating to Part I of the Federal Power Act since the charges thereby generated substantially cover the cost of administering that part of the Act.[3]

Our order adopting fee schedules applicable to natural gas pipelines recognized that "neither our costs nor the dollar value of facilities will remain static" and that revision "may be necessary in the light of subsequent experience." The growing complexity of certificate proceedings and increases in costs incurred in administering the certificate programs requires a slight upward readjustment of the rates presently applicable if our operation of this activity is to remain self-sustaining. Accordingly, we propose to increase the amounts payable in connection with applications for certificates under Section 7(c) and (e) of the Natural Gas Act.

The remaining costs of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings. Our proposal to allocate estimated costs among jurisdictional companies on the basis of their relative amounts of natural gas delivered seems fair and equitable since their rates are subject to continued surveillance in addition to the complexity of the issues raised in the augmented number

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[3] FY 1970 collections for administering Part I of the Federal Power Act totalled $2,568,106 in contrast with actual costs of operations for that Part of $2,966,977 (exclusive of overhead expense and services to other agencies and the public). However, collections effected under Part I powers vested in the Commission totalled $5,337,703, of which $4,504,299 was paid into the Treasury.

of applications for rate increases which have surfaced in recent years.

We also propose to adopt a fee schedule which will return to the Treasury the costs of the producer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period. The pipelines will be able to recoup the amount of such payments from their customers as part of the costs upon which their rates and charges are based.

The proposed assessments and fees applicable to our functions under Parts II and III of the Federal Power Act are new. Our functions in carrying out the responsibilities imposed under those parts of the Federal Power Act confer benefits upon the recipients. The manner in which allocations should be made has been the subject of much study. We believe our proposals not only spread those costs fairly and equitably but that they are consistent with the legislative and executive mandates we are required to carry out.

The filing fees to be paid upon the filing of designated applications and rate schedules, other than for major rate increases, are in fixed amounts based upon average historic costs incurred in the administration of each of those functions. The sliding scale proposed for major rate increases based upon gross revenues represents, in our judgment, a fair and equitable method of providing for recovery of the average costs involved in the consideration and disposition of those items.

We have also proposed a formula to recoup the remaining costs of our regulatory program and those incurred in the administration of reliability functions by assessments based on revenues as reasonably representative of the value of

those services to such companies. We believe our activities in both areas of our operations provide special benefits to the companies subject to our jurisdiction that fully justify the scale of charges we propose to initiate.

Additional miscellaneous charges have been considered to cover costs incurred in connection with the location of file materials requested for inspection and/or copying. Under existing regulations fees are charged for copying pursuant to contract with a private company which provides that service. Moreover, about 75 percent of our searches for filed materials requires less than one-half hour for which charges would not be administratively feasible. In these circumstances, we believe that only a fee should be charged for certification of documents in the amount of $2.00 to cover the estimated cost thereof.

In developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . . " or provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . . " or provides business stability or assures public confidence in the business activity of the beneficiary . . . " or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . . ".

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis but are authorized to average the costs involved in a particular serv-

ice. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities.

The proposed amendments to the Commission's regulations would be issued under the authority granted by the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 USC 825h) and the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 USC 717o).

A. The following are proposed amendments to Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations.

1. Amend the title of Part 3 by inserting the words "Miscellaneous Charges" immediately preceding the words "Ethical Standards". As so amended the title of Part 3 will read:

PART 3—ORGANIZATION; OPERATION; INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Amend "§ 3.102 Public information, requests, and assistance" by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * *

(b) During the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D.C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Com-

mission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

B. The following are proposed amendments to Subchapter B—Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. Revise the title of "Part 11—Annual Charges" to read as follows:

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32—Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", revise the section titles and introductory clauses of §§ 32.1, 32.22, 32.51, to read as follows:

§ 32.1 Contents of application; filing fee.

Every application under section 202(b) of the Act shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth the following information:

* * * * *

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee described in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state

in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee described in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

• • • • •

3. In "Part 33—Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", revise the title and introductory sentence of § 33.2 to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

• • • • •

4. In "Part 34—Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", revise the title and introductory sentence of § 34.2 to read as follows:

§ 34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee described in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

• • • • •

5. In "Part 35—Filing of Rate Schedules", between the heading "Application" and "§ 35.1 Application; obligation to file rate schedules", insert a new "§ 35.0 Filing fees", which will read as follows:

§ 35.0 Filing fees.

Every filing made under this part shall be accompanied by the fee described in Part 36 of this Subchapter.

6. Immediately following Part 35, add a new "Part 36—Annual Charges and Fees" which will read as follows:

PART 36—ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory and interconnection and coordination programs from which shall be deducted the amounts reserved pursuant to the provisions of paragraph (c) of this section and section 36.2 of this part.

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each public utility in the proportion that the gross revenues of such public utility bear to the sum of the gross revenues of all public utilities for the like period.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act, except applications under Part I of the Federal Power Act, applications for authority to hold interlocking positions, and applications for the merger or consolidation of public utilities as provided in paragraph (d) of this section $500

(d) Applications for the merger or consolidation of Class A or Class B public utilities or any combination thereof $10,000

(e) Nominal rate schedule filings other than that involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of

rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting service, rates or billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings .. $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving nominal rate increases $500

(1) These include schedule changes involving increases in rates totalling less than $50,000.

(h) Rate schedule filings involving rate increases other than covered under paragraph (g) of this section, as follows.

1 percent of the amount of such increases up to but not exceeding $1 million;

$10,000 plus ½ percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

$55,000 plus ¼ percent of the amount of such increases in excess of $10 million.

(i) Applications to hold interlocking positions $100

§ 36.3 Miscellaneous

Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded.

§ 36.4 Accounting for fees paid pursuant to this part.

A public utility subject to the provisions of this part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45—Application for Authority to Hold Interlocking Positions", revise the title and introductory clause of § 45.8 to read as follows:

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee described in Part 36 of this Subchapter and shall state the following:

• • • • •

B. The following are proposed amendments to Part 159, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations:

1. In § 159.2 Applications involving construction or acquisition of facilities, revise paragraphs (a), (b) and (d) to read as follows:

§ 159.2 Applications involving construction or acquisition of facilities.

• • • • •

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent

(0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * *

2. Immediately following § 159.2, insert a new "§ 159.2a Costs administration" which will read as follows:

§ 159.2a Costs of administration.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as follows:

(a) A determination shall be made for each fiscal year of the costs of administration of the natural gas pipeline programs from which shall be deducted the amounts received pursuant to the provisions of sections 159.1 and 159.2 of this Part.

(b) For each calendar year terminating in such fiscal period the costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total gas deliveries of such natural gas company bear to the sum of the total gas deliveries of all Class A and Class B natural gas companies for the like period.

(c) In addition to the annual charges prescribed by paragraphs (a) and (b) of this section, each natural gas company required to file an Annual Report - Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(d) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

3. In "§ 159.3 Miscellaneous", revise paragraph (a) to read as follows:

§ 159.3 Miscellaneous.

(a) *Method of Payment.* Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

By direction of the Commission.

GORDON M. GRANT,
Secretary.

APPENDIX B

APPENDIX S

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-282

ESTABLISHMENT OF FEES TO BE PAID BY APPLICANTS FOR NATURAL GAS PIPELINE COMPANY CERTIFICATES AND OTHER AUTHORIZATIONS

Notice of Proposed Rulemaking

(18 CFR, Parts 152, 153, 156, 157, 159)

(Issued September 15, 1965)

1. Pursuant to section 4 of the Administrative Procedure Act the Commission gives notice that it proposes to establish a schedule of filing fees relating to applications by natural gas pipeline companies for certificates of public convenience and necessity as well as applications for exemption under section 1(c) of the Natural Gas Act, for export or import authority, for an order directing a pipeline company to serve a local distributor or for abandonment authority.

2. Congress has established the policy "that any * * * benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency * * * to or for any person * * *, except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible". Independent Offices Appropriation Act of 1952, 5 U.S.C. 140. In order to accomplish this objective, Congress authorized the head of each agency, which includes the Federal Power Commission, to prescribe by regulation such fees and charges as are determined to be fair and equitable "taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other

pertinent facts." Congress also provided that the regulations prescribed by agencies in the Executive branch shall be as uniform as practicable and subject to such policies as the President may prescribe. The Bureau of the Budget on behalf of the President has issued Circular No. A-25, September 23, 1959, which sets forth general policies for developing an equitable and uniform system of charges for certain Government services and property so as to implement the provisions of the Independent Offices Appropriation Act of 1952.

3. The regulatory activities of the Federal Power Commission convey special benefits to identifiable recipients above and beyond those which accrue to the public at large. Congress has adopted the policy that the recipient of special benefits conveyed by a Federal agency program should pay a reasonable charge to defray the cost of the program and to relieve the general taxpayer who bears the major burden of supporting Federal agencies. The Commission has reviewed its functions under the Federal Power Act and the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act and under the generally parallel rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. The Commission is also of the view that its administrative costs of certification of sales of natural gas by independent producers to pipelines should not be charged to the producers, both because of administrative difficulties and the fact that these proceedings frequently involve questions of rates and are thus ancillary to our rate jurisdiction over such persons. The Commission already assesses charges against hydroelectric licensees for the purpose of defraying the costs of administration of Part I of the Federal Power Act (16 U.S.C. 803(e)).

However, we believe the public interest would be served by the establishment of a fair and equitable schedule of fees designed to recover our costs for the services rendered in processing applications for the certificating of interstate transportation and sale of natural gas for resale by pipeline companies and the other matters enumerated. We propose that all qualifying applicants pay a nominal filing fee of $50. In addition, we propose that applicants for authority to construct facilities for the transportation of gas pay a fee amounting to five one-hundredths of one percent of the estimated cost of the facilities for which a certicate is requested, payable at the time of filing, plus a fee of ten one-hundredths of one percent of the estimated cost of the facilities for which a certificate is granted and accepted.

The proposed fees are based upon the Commission's cost of conducting this function, the number of filings in this category and the estimated costs of the facilities for which application was made in recent years. We recognize that neither the Commission's costs nor the dollar value of facilities will remain static and, therefore, that it may be necessary to revise either the $50 fee or the percentage factors or both in the light of subsequent experience.

Finally, we are proposing the accounting to be followed by the companies in recording on their books the fee payments being proposed herein, that the companies charge Account 302, Franchises and Consents, with appropriate amortization, for the amounts of user charges paid by them if they are successful in obtaining certificates, and if the certificate is not granted, that the amounts expended be charged to Account 928, Regulatory Commission Expenses. Since a portion of the user charges will be assessed against the companies at the time the application is filed, we propose that the companies include the initial amounts paid in Account 186, Miscellaneous Deferred Debits, and clear that account to either Account 302 or

928 when final disposition is made of the application by the Commission.

4. Pursuant to section 4 of the Administrative Procedure Act and § 1.19(a) of the Commission's rules (18 CFR 1.19(a)), any interested person may submit to the Federal Power Commission by November 5, 1965, data, views, and comments in writing concerning the amendments now being proposed herein. The Commission will consider these written submittals before taking any action upon the proposed amendments. An original and nine copies of any such submittals should be filed.

5. These amendments to the Commission's Regulations Under the Natural Gas Act (18 CFR, Chapter I, Subchapter E) are proposed to be issued under the authority of the Natural Gas Act, as amended, particularly sections 1(c), 3, 7, 8 and 16 thereof (52 Stat. 822, 824, 825, 830; 56 Stat. 83; 68 Stat. 36; 15 U.S.C. 717(c), 717(b), 717f, 717g, 717o); Executive Order 10485 (18 F.R. 5397; 3 CFR, 1949-53 Comp. 970); section 5 of the Outer Continental Shelf Lands Act (67 Stat. 462, 464; 43 U.S.C. 1334 (c)); section 140 of Title 5 of the U. S. Code; and Budget Bureau Circular A-25 (September 23, 1959).

6. In consideration of the foregoing, the Commission proposes to amend Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations as follows:

a. Amend Subchapter E by adding a new Part 159 to read as follows:

"Part 159—Filing Fees

§ 159.1 Filing fees for applications not involving construction of facilities.

A filing fee of $50 shall accompany each of the following:

(a) Applications for exemption under section 1(c) of the Act;

(b) Applications to import or export natural gas under section 3 of the Act;

(c) Applications for a permit to maintain facilities at the borders of the United States under E. O. 10485;

(d) Applications and petitions to intervene requesting orders under section 7(a) of the Act;

(e) Applications for authority to abandon under section 7(b) of the Act;

(f) Applications under sections 7(c) and (d) of the Act for certificates of public convenience and necessity;

(g) Applications for a determination by the Commission pursuant to section 5 of the Outer Continental Shelf Lands Act;

(h) Amendments to any of the applications listed in (a) through (g) hereof.

§ 159.2 Filing fees for applications and amendments involving the construction of facilities.

In addition to the fees prescribed by § 159.1, applicants for a certificate of public convenience and necessity under sections 7(c) and (d) of the Act to construct and operate facilities shall pay the following fees:

(a) Within 30 days following the issuance of Notice of Application, an amount equal to 5/100 of one percent (i.e., 0.0005) of the estimated cost of construction of new facilities;

(b) Within 30 days following the grant of the certificate, an amount equal to 10/100 of one percent (i.e., 0.001) of the estimated cost of the facilities;

(c) If an amendment to a pending application increases the total cost of the facilities for which a

certificate is requested, an additional amount, computed with respect to the increase as provided in paragraph (a) hereof, shall be paid;

(d) If, upon completion of the facilities authorized, the actual cost thereof exceeds the estimated cost, the statement of actual cost, required to be submitted by § 157.20(c)(4) of this chapter, shall be accompanied by an amount equal to 15/100 of one percent of the excess of actual cost above estimated cost.

§ 159.3 Miscellaneous.

(a) *Method of payment.* Fee payments shall be by certified check or money order payable to the Treasurer of the United States. No fees will be refunded. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriation Act of 1952 (5 U.S.C. 140).

(b) *Exemption.* The provisions of this part shall not apply to independent producers, as defined in these regulations.

(c) *Amendments to outstanding certificates.* Applications to amend outstanding certificates, authorizations or orders will be treated as an initial application for the purposes of this part.

§ 159.4 Accounting for fees paid pursuant to Part 159.

A natural gas company subject to the provisions of this part shall account for the fees paid as follows: Pending Commission action on certificate and other applications, amounts paid when an application is noticed shall be charged to Account 186, Miscellaneous Deferred Debits, and held in suspense until the application is either issued or denied. Upon grant of

a certificate or other order by the Commission, the amount suspended in Account 186 and the additional charges then due shall be charged to Account 302, Franchises and Consents, with appropriate amortization, with a separate record maintained for each transaction. If the application is denied, the amount suspended in Account 186 shall be charged to Account 928, Regulatory Commission Expenses, in the year the application is denied.

* * *

b. Appropriate technical amendments to Parts 152, 153, 156 and 157 incorporating therein, by reference, the requirements of Part 159."

By direction of the Commission.

GORDON M. GRANT,
Acting Secretary.

COURT, U. S.

APR 13 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

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April 13, 1973

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